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Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: March 14, 1960
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Capitol Airways, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause.

OPINION BELOW

The Opinion of the Court below (Appendix A, *infra*, pp. 1a-13a) is officially reported at 271 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1959. An Order denying petition for rehearing was entered on December 15, 1959. By order dated January 14, 1960 this honorable Court extended the time for filing Petition for Certiorari to March 14, 1960. The jurisdiction of this Court is invoked under 28 USC 1254 (1) and 47 USC 402 (J).

QUESTIONS PRESENTED

1. Whether, in an adjudicatory proceeding involving comparative fitness, Section 401 (d)(1) of the Civil Aeronautics Act requires the Civil Aeronautics Board to make findings when it denies (as distinguished from when it grants) an application for a certificate of public convenience and necessity.[1]

2. Whether the appearance, without notice or adjustment of time allocation, at oral argument before the Civil Aeronautics Board by members of Congress as advocates for a competitive applicant denied Petitioner a fair hearing.

STATUTES INVOLVED

The statutes involved are the Civil Aeronautics Act of 1938, as amended, 52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.*, and the Administrative Procedure Act, 60 Stat. 240 *et seq.*, 5 U.S.C. 1001 *et seq.* Particularly involved are Sections 401(d)(1) and 1005 (f) of the Civil Aeronautics Act and Section 8(b) of the Administrative Procedure Act; these statutory provisions are set forth in Appendix B, pp. 15a-16a.

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[1] It is undisputed that the applicability of the Civil Aeronautics Act to this case is unaffected by its repeal and replacement by the Federal Aviation Act of 1958, 49 USCA 1301 *et seq.*

STATEMENT OF THE CASE

This Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit which affirmed an Order of the Civil Aeronautics Board in a proceeding known as the *Great Lakes-Southeast Service Case*. The agency's Order denied your Petitioner's application for a certificate of public convenience and necessity and awarded to other air carriers the Miami-Chicago and Miami-Detroit routes which it sought.

At the time of the proceeding sought to be reviewed, your Petitioner was engaged in air transportation as an "irregular" or "non-scheduled" carrier. In its application to the Civil Aeronautics Board in Docket No. 7520, which was consolidated for hearing in the *Great Lakes-Southeast Service Case*, Docket No. 2396, *et al.*; Petitioner sought authority to engage in scheduled air transportation of persons, property and mail (on a non-subsidy basis) primarily between Miami and Chicago, and between Miami and Detroit. Your Petitioner proposed to operate a low-cost air coach service over these routes at fares about 26 percent below those being charged by the existing carriers. In support of this proposal 62 elaborate exhibits were submitted in evidence; these were supplemented by extensive testimony of sponsoring witnesses. Other carriers were applicants for comparable new route authority, and similarly submitted extensive evidence in support of their proposals, but none submitted any evidence rebutting Petitioner's "fitness, willingness or ability" to operate the proposed new air transportation service.

At the time of oral argument, the Board denied, *inter alia*, the request of Petitioner for additional time and then without prior notice allowed members of

Congress or their representatives to present oral argument and submit *ex parte* written material to the Board. While some of these Congressional presentations were confined to the public need for additional transportation, at least four Senators and one Congressman specifically advocated that Northwest Airlines be certificated over the Chicago-Miami route, in preference to other applicants, including your Petitioner.

Thereafter, in its opinion (Order No. E-13024, dated October 2, 1958) the Board denied the application of Petitioner and awarded the Chicago-Miami route to Northwest Airlines. No findings were made concerning Petitioner's fitness or the public need for the low-cost service which it proposed. Rather, the Board "found" that for various reasons the application of Northwest should be granted.

Petitioner then petitioned for Judicial Review claiming (1) that under Section 401(d)(1) of the Civil Aeronautic Act the Board must make findings when it denies an application for a certificate, and (2) that the Congressional appearances at oral argument in support of a competitor denied Capitol a fair hearing.

As to the first question, the Court below held that Section 401(d)(1) of the Civil Aeronautics Act "does not purport to deal with situations where the Board has decided *not* to grant the certificate" and that ". . . where one of competitive applications is held preferable to others . . . no further findings with respect to the unsuccessful applicants is required."

On the second question the Court below denied Capitol's motion for the appointment of a Commissioner or Referee to determine whether Northwest

had procured the Congressional testimony, and held that even though Northwest actively solicited such testimony this action did not constitute "undue influence" nor did the Congressional appearances at oral argument deny Capitol a "fair hearing".

REASONS FOR GRANTING THE WRIT

I. THE CONSTRUCTION GIVEN BY THE COURT BELOW TO SECTION 401(d)(1) OF THE CIVIL AERONAUTICS ACT IS ERRONEOUS, FAR REACHING, AND INCONSISTENT WITH OTHER STATUTORY PROVISIONS.

Section 401(d)(1) of the Civil Aeronautics Act provides as follows:

> "(d)(1) The Authority (Board) shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority (Board) hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

The question is whether the clause "otherwise such application shall be denied" requires that the Board make findings in cases where it *denies* an application for a certificate of public convenience and necessity. The Court below held that *no findings whatsoever* are necessary in these circumstances, stating—

> "As we read the section, it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided not to grant the certificate".

A. Not Only the Certification of Air Carriers, But the Certification of Motor Carriers, Water Carriers and Freight Forwarders is Governed by Provisions Substantially the Same as Section 401(d)(1) of the Civil Aeronautics Act

The construction of Section 401(d)(1) of the Civil Aeronautics Act is of importance to the transportation industry in general. The critical language, "otherwise such application shall be denied", applies to motor carriers (49, 551(a), 49 USCA 307(a)), water carriers (54 Stat. 941(C), 49 USCA 909(c)), and freight forwarders (56 Stat. 291(c), 49 U.S.C.A. 1010(c)), as well as to air carriers. The resolution of this problem is, therefore, one of general interest.

In *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957), an application for a motor carrier certificate was *denied* by the Interstate Commerce Commission. This action was reversed and remanded by the Supreme Court because of the *inadequacy of findings;* This Court stated:

> "Since the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said."[1]

The Declaration of Congressional Policy with respect to Civil Aviation as set forth in Section 2 of the Civil Aeronautics Act of 1938 (see Appendix B herein) is,

[1] See also the very recent decision in *Pacific Far East Line, Inc.* v. *Federal Maritime Board*, App. D.C. No. 15085 (Feb. 4, 1960), to the same effect.

for all practical purposes, the same policy as that set forth in the Transportation Act of 1940 (49 U.S.C.A. 1) as the "National Transportation Policy". The fact that the "National Transportation Policy" as set forth in the latter statute may not technically apply to air carriers, is of no consequence in this case since it is obvious that the Civil Aeronautics Board must administer the Civil Aeronautics Act of 1938 in accordance with the provision of Section 2 of that statute. In other words, the Board must make the same "findings" under the Civil Aeronautics Act of 1938 as the Interstate Commerce Commission must make under the Transportation Act of 1940.

Moreover, it is apparent that this Court in the *Schaffer Case* was not attempting to dictate to the Interstate Commerce Commission the manner in which that agency should apply the National Transportation Policy; rather, this Court was concerned with the lack of "findings" and hence the inability of the reviewing court properly to evaluate the Commission's decision. Thus, this Court stated (355 U.S. 86, 88):

> "Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation has been made in accordance with the mandate of Congress."

It should also be noted that Mr. Justice Frankfurter in his dissenting opinion in the *Schaffer Case* insisted that the Commission make adequate findings and set forth the reasons for its decisions. Mr. Justice Frankfurther stated (355 U.S. 95) as follows:

> "It is, however, pertinent to add that the Court's decision may serve a useful purpose if it will lead the Interstate Commerce Commission, despite its

enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action."

B. The Decision That No "Findings" Need Be Made When an Application is Denied is Inconsistent With Both the Requirements for "Findings" Imposed by Section 1005(f) of the Civil Aeronautics Act and for "Reasons and Basis" Prescribed by Section 8(b) of the Administrative Procedure Act, as These Statutes Have Been Interpreted by the Court of Appeals, District of Columbia Circuit

Section 1005(f) of the Civil Aeronautics Act specifically requires findings of fact for *every* order—even orders denying applications. This is the effect of the decision in *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board*, 231 F. 2d 517 (D.C. Cir. 1956), where the Court reached this conclusion at pages 521-2:

> "The agency's findings must also be sufficiently definite to enable the courts to perform the task of judicial review. *Spiegel* v. *Public Utilities Commission*, 96 U.S. App. D.C. 307, 226, F. 2d 29, certiorari denied sub nom. *Capital Transit Co.* v. *Spiegel*, 1955, 350 U.S. 904, 76 S. Ct. 182; *Beaumont, S. L. & W. Ry.* v. *United States*, 1930, 282 U.S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221."

The Court also noted:

> "Despite these considerations, the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and

> was relevant to the Board's ultimate decision as to what the public convenience and necessity required. The Board's failure to supply an answer was not harmless error, but prejudiced Greensboro's position in its efforts to obtain judicial review. We think the Board should now make appropriate findings of fact on the issue, and state 'the reasons or basis' for its conclusion."

The Petitioner in the *Greensboro Case* was only an intervenor (as distinguished from an applicant) in the CAB proceeding complained of, and did not even participate in that proceeding until after the Examiner's Initial Decision. The contention sustained by the Court of Appeals was that

> ". . . the Board failed to make adequate findings showing the reasons for its *rejection* of Greensboro's contentions." (emphasis added)

This result, of course, was not based on Section 401 (d)(1), but rather on Section 1005(f) of the Civil Aeronautics Act which requires "findings" for "every order" and Section 8(b) of the Administrative Procedure Act which requires "findings and conclusions" as well as the "reasons and basis therefor."

The decision of the court below creates an inconsistency, which must be resolved by this Court. In the case of *United States* v. *Raymore*, 302 U. S. 540 (1938), rehearing denied in 303 U.S. 665 (1938), the Court stated at p. 547:

> "A construction of a statute that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress."

See also: *Helvering* v. *Credit Alliance Corporation*, 316 U.S. 107 (1942).

The court below cites *Continental Southern Lines* v. *CAB*, 197 F. 2d. 397 (D.C. Cir. 1952) and *North American Airlines* v. *CAB*, 241 F. 2d. 445 (D.C. Cir. 1957) in support of its decision that no "findings" need be made with respect to unsuccessful applicants. The Continental Southern and North American cases do not stand for any such proposition. Continental Southern Lines was a surface carrier attempting to enter the field of air transportation and hence required to comply with the provisions of Section 408 of the Civil Aeronautics Act, which, in effect, prevents surface carriers from participating in air transportation unless the Board finds that the surface carrier can "use aircraft to public advantage in its operation and will not restrain competition." Continental Southern had not even attempted to comply with the provisions of Section 408. In this connection the Court of Appeals for the District of Columbia Circuit held (197 Fed. 2d. 397, 401) that

> ". . . the applicant failed to make a record upon which the Board could either decide the Section 408 issue or determine whether there was a reasonable likelihood that its standards could be met."

Having failed to comply with the provisions of Section 408 Continental Southern Lines "could not furnish the immediate service which the public convenience and necessity required. . . ."[1] Hence, there was a *fatal defect* in the application of Continental Southern and under these circumstances the Court quite properly held that no further "findings" by the Civil Aeronautics Board were necessary.

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[1] 197 Fed. 2d. 397, 403.

The North American Airlines Case (241 Fed. 2d. 445) stands for substantially the same proposition as the Continental Southern Case, *supra*. In *North American* the Civil Aeronautics Board made numerous findings that the services proposed by the applicant would be less effective than those which other carriers could furnish. The Board also found that because of North American's previous record of violations of the Civil Aeronautics Act the applicant was not qualified to receive a Certificate of Public Convenience and Necessity. On appeal North American argued that the Board should not consider North American's violations without considering the violations of other applicants. This argument was rejected by the Court of Appeals for the District of Columbia Circuit citing *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 237, F. 2d. 209 (D.C. Cir. 1956).

It is therefore apparent that neither of the cases cited by the lower court stand for the proposition that a different standard applies to the case in which an application is denied by the Civil Aeronautics Board as opposed to a case in which an application is granted. Indeed, the doctrine, as set forth by the lower court, is completely illogical in view of the fact that an *unsuccessful* applicant is generally the party seeking judicial review of the decision of an administrative tribunal, whereas a *successful* applicant is generally willing to abide by the agency's decision.

II. THE PROPRIETY OF MEMBERS OF CONGRESS IN THE ROLE OF ADVOCATES IN ADJUDICATORY PROCEEDINGS BEFORE ADMINISTRATIVE AGENCIES IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

At least four Senators and one Congressman appeared at oral argument before the Civil Aeronautics Board to advocate the certification of Northwest Airlines for the Chicago-Miami route sought by Capitol. The record shows beyond a shadow of a doubt that the following Members of Congress (or their representatives) were not arguing for the "public interest" as such but rather for the selection of Northwest Airlines for the Chicago-Miami route as opposed to any other applicant. Thus, the record shows as follows:

> (1) Senator Edward J. Thye: "Mr. Chairman, my privilege of appearing before you this morning in behalf of Northwest Airlines in the Great-Lakes-Southwest Service Case is appreciated." (R. 14539)
>
> (2) Senator Hubert H. Humphrey (appearing through William Connell): ". . . The Senator is supporting in this case the application of Northwest Airlines for the Chicago-Miami route." (R. 14547)
>
> (3) Congressman Donald E. Tewes: ". . . The record clearly indicates that the choice of the Board should be Northwest." (R. 14559)
>
> (4) Senator Milton Young (appearing through Christopher U. Sylvester): "May I urge you, therefore, to authorize Northwest Airlines to provide this urgently needed new service between Chicago and Miami." (R. 14574)

In addition, the Board permitted Members of Congress, or their representatives, to submit to the Board during oral argument statements and/or telegrams allegedly supporting the application of Northwest Air-

lines without any notice to Capitol Airways, or, indeed, any opportunity to examine such documents. For example, the following statement appears at R. 14568:

> "My name is Ray Dockstader. I am assistant to Senator Mike Mansfield. I have two statements which I ask be made a part of the permanent record; one is a statement prepared by Senator Mansfield, supporting the extension of the routes of Northwest Airlines via Minneapolis and Chicago to Miami. He has attached a number of telegrams he would like to put into the record.
> "I also have a letter to the Board from Senator Murray, supporting Northwest's application."

These appearances were without prior notice to Petitioner, and followed an unsuccessful request by Petitioner for additional time for argument. In the Court below Capitol moved for the appointment of a Commissioner or Referee to determine whether the appearances of these Congressmen had been solicited by Northwest; the motion assumed that Northwest's initiative in this respect would constitute exertion of undue influence. The Court below denied the Motion and held that this procedure *did* not deny Capitol a "fair hearing" even though Northwest had "actively solicited" the Congressional appearances.

Petitioner claims that the appearance of Congressmen as advocates in a competitive adjudicatory proceeding necessarily violates the agency's "judicial character" as prescribed by its own Procedural Regulations.

The Board's Principles of Practice in Economic Proceedings as set forth in Part 300 of its Economic Regulations (14 C.F.R. Section 300 *et seq.*) provides in part as follows:

"It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:

* * * * *

"(c) It is improper that there be any effort by any interested person in the cases to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board . . ."

In its recent Opinion and Order Denying and Dismissing Portions of Petitions for Reconsideration in the *New York-San Francisco Non-stop Service Case*, Order No. E-14664, November 19, 1959, the Board itself pointed up the problem in these terms:

"These rules, with others, were promulgated in 1951 to serve as a guide for all parties and the Board and its staff in relation to proceedings before the Board. Unfortunately, as this case illustrates, uncertainties surrounding the regulation have limited its clarity and usefulness as a guide."

If, in fact, the Board is to permit the appearance at oral argument of any number of Congressmen as advocates for any particular applicant in an adjudicatory proceeding without prior notice to opposing parties, then all such proceedings before the Board are reduced to a sham. Indeed, under any such interpretation the applicant with the best chance of winning any particular case would be the applicant which, through political influence, can produce the most Congressmen in its behalf at oral argument. No judicial or quasi-judicial tribunal can possibly discharge its proper functions under any such rule.

Agency action that substantially and prejudicially violates the agency's rules cannot stand. See: *Sanga-*

mon Valley Television Corp. v. *United States*, 269 F. 2d 221 (D.C. Cir. 1959); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 372-3 (1957); *Jefferson Amusement Co.* v. *Federal Communications Commission*, 226 F. (2d) 277, (D.C. Cir. 1955); *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F. (2d) 437, 442-43 (D.C. Cir. 1949).

In every case "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955). It has not done so here. The only reason these Congressmen were asked to appear was because Northwest assumed that their appearance would have some influence on the administrative decision, irrespective of the facts of record in the case.

This is a matter of major concern to the Bar and the CAB itself. A panel discussion by representatives of Industry, Government and the Bar was held June 15, 1959, under the auspices of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 86 Cong. 1st Sess. These hearings entitled "Major Administrative Problems" concerned in part the problem of Congressional advocates before the Civil Aeronautics Board. The Chairman of the CAB (Mr. Durfee) acknowledged that he knew of "no rule of the Board which specifically refers to the right of a Member of Congress to appear." (p. 33 of Hearings). He went on to the conclusion at pp. 38-9:

> "I can assure this Committee the Board has been very much concerned. This thing has been growing for 20 years and it has grown substantially in the past few years that I have been on this Board.

"I might say that as a former chairman of a State regulatory commission, it was a practice with which I had no experience. I never heard of a State legislator appearing before the Public Service Commission of Wisconsin to participate in oral argument.

"I might say that the growing irritation . . . that the members of the bar have with this practice, has been much more forcefully expressed here than I have ever heard it before, but, nevertheless, I have been conscious of it and I can assure you, Mr. Chairman, that the Board itself is studying this problem."

The allegation that the Board is "studying this problem" is of no comfort to your Petitioner. The denial of a fair hearing to Petitioner in this case cannot be cured by any subsequent change in the Board's Rules of Practice (or Legislation) which would limit or revoke the rights of Congressmen to appear at oral argument before the Board. The injustice which has been done your Petitioner cannot be remedied except by appropriate order of this Court.

The problem of Congressmen as advocates in adjudicatory proceedings is part of the recent criticism of the administrative agencies. See, for example: *Sangamon Valley Television Corp.* v. *U. S.*, 358 U.S. 49 (1958); *Id.*, 269 F. 2d 221 (D.C. Cir. 1959); *WIRL Television Corp.* v. *U. S.*, 358 U.S. 51 (1958); WORZ, *Inc.* v. *F. C. C.*, 358 U.S. 55 (1958); *Id.* 268 F. 2d 889 (D.C. Cir. 1959). This particular problem, no less than the others, should be reviewed by this court

CONCLUSION

The issues which Petitioner raises are of fundamental importance to the air transport industry and to other industries which are regulated by Federal Agencies. In the instant case your Petitioner's application for a certificate of public convenience and necessity was denied without any findings by the Civil Aeronautics Board. At oral argument before the Board various members of Congress were permitted to appear as advocates for a competing applicant without notice to your Petitioner; without opportunity to rebut their arguments and with no regard for a fair allocation of time to the various applicants.

The Court below held that in cases where the Civil Aeronautics Board denies an application for a certificate *no findings whatsoever* are required. The Court also held that the appearance of Congressmen at oral argument as advocates for a competing applicant did not deny your Petitioner a fair hearing even though such appearances were actively solicited by a competing (and successful) applicant.

The practical effect of the ruling of the Court below is to deny a fair hearing to any applicant in an adjudicatory proceeding before the Civil Aeronautics Board. Thus, any applicant for a certificate can, with the blessing of the Court below, win his case before the Board by exerting Congressional influence upon the Board without any regard to the record or the merits of his case. A competing applicant, who has endeavored to present his case on the merits, can never obtain effective judicial review (even though the decision of the Board might be completely arbitrary and capricious) because the Court below holds that *no findings*

are required in cases where the Board *denies* an application for a certificate.

In so far as the first question is concerned, the opinion of the Court below is in direct conflict with the opinions of other Circuit Courts, with the opinions of this Court and with the provisions of Section 1005(f) of the Civil Aeronautics Act and Section 8(b) of the Administrative Procedure Act. The second question (propriety of Congressional appearances at oral argument in an adjudicatory proceeding) is of far reaching importance directly affecting all adjudicatory proceedings before the Civil Aeronautics Board and indirectly affecting such proceedings before other similar Federal Regulatory Agencies.

By reason of the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 14, 1960

PROOF OF SERVICE

I, Coates Lear, attorney for Capitol Airways, Inc., Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on March 14, 1960 I served a copy of the foregoing Petition for Writ of Certiorari upon the persons listed below, by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 341, 342, 344—October Term, 1958

(Argued June 3, 1959 Decided October 7, 1959.)

Docket Nos. 25422, 25434, 25532

EASTERN AIR LINES, INC., CAPITOL AIRWAYS, INC., NATIONAL AIRLINES, INC., CITY OF NASHVILLE and the NASHVILLE CHAMBER OF COMMERCE, *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,

DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., CAPITAL AIRLINES, INC., *et al.*, *Intervenors*.

Before:

CLARK, *Chief Judge*, LUMBARD and WATERMAN, *Circuit Judges*.

The several petitioners bring their respective petitions seeking review of orders of Civil Aeronautics Board entered in the *Great Lakes-Southeast Service Case* wherein that Board granted certain applications and denied others,

all pursuant to Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, for certificates of public convenience and necessity to perform new air transportation service. The several petitions are each denied. Capital moved for the appointment of a Commissioner or Referee to determine matters relative to procurement of Congressional testimony. This motion is denied.

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C. FRANK REAVIS (Hodges, Reavis, McGrath & Downey, Robert Thrun, Frederick R. Adler, Richard B. Smith), New York City; (Leasure & Pendleton, Washington, D. C., of counsel), *for Northwest Airlines, Inc.*

ROBERT B. HANKINS, MACON M. ARTHUR (Adair, Ulmer, Murchison, Kent & Ashby, Charles H. Murchison, James H. Bastian, of counsel), Washington, D. C., *for Capital Airlines, Inc.*

COATES LEAR, LLOYD FLETCHER, Washington, D. C., *for Capitol Airways, Inc.*

D. L. LANSDEN, LAWRENCE DORTCH, Nashville, Tenn.; ROBERT REDDING, Silver Spring, Md.; (Howard F. Cerny, New York City; Waller, Davis & Lansden, Nashville, Tenn., of counsel), *for City of Nashville and Nashville Chamber of Commerce.*

EDMUND A. STEPHEN, ROBERT L. STERN, FLOYD M. RETT (Mayer, Friedlich, Spiess, Tierney, Brown & Platt), Chicago, Ill., *for United Air Lines, Inc.*

VICTOR R. HANSEN, Asst. Atty. Gen.; Richard A. Solomon, Atty., Dept. of Justice; Franklin M. Stone, Gen. Counsel, CAB; John H. Wanner, Assoc. Gen. Counsel; O. C. Ozment, Asst. Gen. Counsel; Morris Chertkov, Monte Lazarus, Ulrich V. Hoffman, Attys., CAB, *for Civil Aeronautics Board.*

WATERMAN, *Circuit Judge:*

Presented here for our decision are three separate petitions for review of orders of the Civil Aeronautics Board[1] arising out of the "Great Lakes-Southeast Service Case."[2] These orders marked the culmination of an extensive hearing[3] on new route applications for service between points in a specified geographic area of the Middle West on the one hand and Florida on the other. The Board's ultimate

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[1] The orders are E-13024, the Board's formal opinion in the *Great Lakes-Southeast Service Case*, rendered on September 30, 1958, and E-13211, entitled "Opinion and Order Granting and Denying Stay of Effective Date of Certificates," rendered November 28, 1958. In view of our disposition of the contentions herein we need not decide whether the second order was effective to supplement the formal opinion, but see *Frontier Airlines* v. *CAB*, 259 F. 2d 808, 810-811 (D. C. Cir. 1958).

[2] Applications for new route certification are normally decided by the Board in a consolidated "area proceeding." The Board establishes a given geographic area. Thereupon all applications for routes within this area are considered jointly. This Board procedure was approved by the Supreme Court in *CAB* v. *State Airlines*, 338 U. S. 572 (1950).

[3] Some idea of the breadth and complexity of the investigation can be obtained from the following statistics: There were 42 route applications, made by 10 carrier applicants. There were 5 carrier intervenors, 40 civic intervenors, and 42 limited participants. The record consists of 29 volumes totaling 16,000 pages. The evidentiary hearing lasted 8 weeks. The Initial Decision covered 378 pages. The two orders here objected to consist of a modest 88 pages.

decision, insofar as pertinent to this opinion, was as follows: Northwest Airlines was awarded a route between Miami and Chicago; the authority of Delta Air Lines was extended so as to permit Miami-Detroit service; and that of Capital Airlines[4] was extended so as to confer upon it authority to render service between Miami and the three cities of Cleveland, Pittsburgh, and Buffalo. Prior to these awards the route between Miami and Chicago was served by both Delta and Eastern Air Lines; Eastern offered the only single-carrier service between Miami and the cities of Detroit, Cleveland and Pittsburgh;[5] and between Miami and Buffalo there was no direct service. Petitioners are as follows: Eastern, which objects to all three awards; Capitol Airways,[6] and unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes, which objects to the Board decision as to these routes; and the City of Nashville, Tennessee, which objects to the fact that the Board drew the geographical boundaries of the "area proceeding" in such a manner that service to and from Nashville was excluded from consideration.

Eastern

Eastern's primary contention is that the Board has violated the principle of *Ashbacker Radio Corp* v. *FCC*, 326 U. S. 327 (1945) in failing to consolidate in this "Great

[4] Capital Airlines is not to be confused with Capitol Airways, a petitioner herein. Capital is a certificated carrier whose routes cover much of the eastern half of the country.

[5] The Board has authorized "interchange" arrangements between Miami and these cities, providing for single-plane service over the routes of two airlines. From the briefs we gather that these arrangements have been particularly successful.

[6] Capitol is an uncertificated carrier operating under a Board exemption. Its principal business has consisted of performing charter services for the military. For one year, ending July 1955, it conducted scheduled passenger operations within the State of Tennessee.

Lakes-Southeast Service Case" an Eastern application for extension of its route authority from Chicago to Minneapolis/St. Paul so that this extension application would be considered along with the proposals by the other carriers for new service between Chicago and Miami. By its consolidation order E-9734, issued November 16, 1955, the Board eliminated from consideration in the proceeding all applications for service to areas north and west of Chicago. Eastern points out that, under the award here objected to, Northwest, which was previously certificated for service between Minneapolis/St. Paul and Chicago, will now be permitted to conduct direct service between Minneapolis/St. Paul and Miami.[7] Eastern further points out that its application for extension from Chicago to Minneapolis/St. Paul, filed eight years before Northwest's application for Chicago-Miami authority and contemplating exactly the same Miami-Minneapolis/St. Paul service as the Board has here awarded Northwest, was not given simultaneous, comparative consideration. Eastern contends that certification of Northwest for Miami-Minneapolis/St. Paul service will as a matter of economic fact preclude certification of Eastern for that same service. Thus Eastern contends that the Board's procedure has violated the *Ashbacker* principle.[8]

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[7] Pursuant to the Board's consolidation order which denied any successful applicant the right to conduct nonstop flights between "beyond area cities" and points newly authorized in the proceeding, Northwest's flights between Minneapolis/St. Paul and Miami must stop at Chicago. The Board denied Eastern's demand that single-plane flights also be prohibited.

[8] Eastern's *Ashbacker* argument in the *Great Lakes-Southeast Service Case* has been before the courts once previously. Eastern petitioned the Court of Appeals for the District of Columbia to review the Board's consolidation order. The petition was dismissed, *Eastern Air Lines* v. *CAB*, 243 F. 2d 607 (D. C. Cir. 1956), on the theory that a consolidation order was not a "final order" for purposes of judicial review. Having dismissed the petition the court

Ashbacker Radio Corp. v. *FCC*, *supra*, involved two applications for the construction of radio stations. The stations planned to operate at the same frequency and were located in cities less than fifty miles apart. The Federal Communications Commission found that these two applications as a matter of physical fact were mutually exclusive and thereupon granted one application without hearing and relegated the second to a hearing to be held later. The Supreme Court reversed the Commission, holding, as a matter of statutory construction, that two mutually exclusive applications must be granted a concurrent hearing. Although *Ashbacker* dealt only with physical exclusivity its doctrine soon found its way into aeronautical law, and was applied to applications for the same routes which were mutually exclusive "as a matter of economic fact." *Northwest Airlines* v. *CAB* (D. C. Cir. 1952), 194 F. 2d 339; *Delta Air Lines* v. *CAB* (D. C. Cir. 1955), 228 F. 2d 17. See also *Seaboard & Western Airlines* (D. C. Cir. 1949), 181 F. 2d 777; *Western Air Lines* v. *CAB* (9 Cir. 1950), 184 F. 2d 545.

On the other hand, it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established. In this and other area proceedings, when faced with the protests of carriers who have applied for routes outside the geographic limits of the Board's consolidation order, the Board has adhered to the practice of permitting these carriers to intervene and contest the issue of mutual exclusivity. This procedure was expressly approved in *National Airlines* v. *CAB*, 249 F. 2d

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went on to suggest that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings. Eastern quite rightly contends that this decision is not *res judicata* in the present case; and, deciding the case as we do, we need not consider the possible-inapplicability of *Ashbacker*.

13 (D. C. Cir. 1957). It was followed scrupulously in the present case. Eastern was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented none.[9] This failure to make any showing of mutual exclusivity is fatal to Eastern's *Ashbacker* contentions. The cases which have dealt with this problem clearly suggest that it is incumbent upon the applicant asserting mutual exclusivity to substantiate the claim before the agency. *Delta Air Lines* v. *CAB, supra; National Air Lines* v. *CAB, supra.* We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made.

Second, Eastern points to three instances that it claims are such departures from orderly administrative procedure as to vitiate the Board's action. Eastern's contentions, which will be discussed in turn, relate to (1) a "press release" announcing the Board's tentative decision and released six months before the Board's opinion; (2) participation by assistants of Board members at Board meetings in which tentative awards were made; (3) receipt by the Board immediately prior to oral argument of alleged *ex parte* representations concerning an equipment program commenced by Capital Airlines, the carrier ultimately awarded authority between the cities of Miami and Cleveland, Pittsburgh and Buffalo.

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[9] At the hearing before the examiner Eastern requested that the applicants for the Chicago-Miami route be compelled to produce data on the percentage of occupancy on some of the applicants' flights. The request was denied. Before the Board Eastern argued that this "load factor" data was relevant to mutual exclusivity. However, before the examiner Eastern argued only that this evidence was relevant to the ability of these applicants to improve upon Eastern service, or, in the alternative, to the inadequacy of load factor data as evidence in determining the caliber of existing service.

Pursuant to a policy begun at some time more than two years ago, the Board, approximately two months after the completion of oral argument, issued a "press release" announcing the route awards it was granting in the *Great Lakes-Southeast Service Case*. The press release expressly stated that the announcement of the awards did not constitute decisions in the case but that decisions would be entered and issued later. We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion.[10] The awards conferred by the Board's formal opinion, however, coincided exactly with those announced in the previous press release. Eastern claims that in effect this practice amounts to a prejudgment, in that the opinion, written six months subsequently, represents nothing more than a rationalization of conclusions previously reached; and that, therefore, the opinion is a nullity even if otherwise legally sufficient. We do not mean to express approval of the Board's practice of making public its tentative decisions. We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the

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[10] The Board's explanation of its press release procedure is enlightening. Because of the complexity of the data presented to it in an area proceeding (see footnote 3, *supra*) the Board has found it necessary to make a preliminary, tentative decision, then to draft an opinion based upon it, and thereafter to take a further and perhaps final vote to accept or reject the decision embodied in the proposed opinion. Prior to the adoption of the press release procedure, the Board says that news of the Board's tentative decision seemed invariably to "leak" to interested outside persons. The stated purpose of the press release, therefore, is to make this information uniformly available to the general public and is an admission by the Board that "leaks" do occur and that the Board is powerless to prevent them.

careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing.

Eastern objects to two of the Board's subsidiary awards[11] for the reason that at the tentative votes on these awards two assistants to Board members participated in place of their respective superiors.[12] However, leaving aside the fact that these votes were merely tentative, we note that the votes in question were cast only after two days of discussion by the Board when all of its members were present, and that the votes later cast by the assistants were cast in compliance with instructions given by their superiors. Accordingly, we find no improper delegation; and, assuming such right to exist, we find no deprivation of an applicant's right to joint deliberation upon his application by the Board members before vote is had upon it.

Eastern contends that the Board must have considered information in its hands relating to an equipment acquisition program announced by Capital three days prior to commencement of oral argument before the Board as bearing upon the issues here, and therefore Eastern was unfairly prejudiced since this information was not part of the record in the case. More specifically, Eastern objects to Capital's wide circulation of a press release relating to the equipment program and, branding this an effort to bring

[11] These were an award to United to serve Columbus and Dayton on Washington-Chicago flights, and one removing from Northwest all restrictions on that carrier's Washington-Pittsburgh-Cleveland-Detroit route. Eastern had applied for each of the routes which these votes awarded to other carriers.

[12] The award to United was by vote of 4-0, one vote being cast by an assistant. The vote with respect to Northwest was 4-0, two votes being cast by assistants.

improper pressure upon the Board, Eastern demands that the record be reopened to determine Capital's fitness. In addition, Eastern claims that it was unfairly prejudiced because the manufacturer from whom Capital proposed to purchase its equipment communicated to the Board just prior to the beginning of oral argument the details of the proposed purchase. The Board assures us that the decision to award Capital the Miami-Buffalo, Cleveland, Pittsburgh route was uninfluenced by the announcement of Capital's equipment acquisition program. We have no reason to doubt this representation. The communication to the Board by the manufacturer was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case*.[13] See *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, 730 (D. C. Cir. 1956), *cert. denied*, 352 U. S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC*, 258 F. 2d 418 (D. C. Cir. 1958), is inapposite.

Finally, Eastern contends that, as to the following matters, the Board has failed to make appropriate findings or has failed to support its findings with substantial evidentiary findings: inadequacy of existing service; advantages purported to result from competitive authorizations; sufficiency of various markets to support additional carriers; and insubstantiality of Eastern's loss of revenues resulting from new authorizations.

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[13] Equipment acquisition programs are relevant to a carrier's needs for additional revenue. At the time of the communication to the Board, the Board was conducting a comprehensive investigation of passenger fares. Second, a change in the ownership of Capital, a matter calling for Board approval under Sec. 408 of the Civil Aeronautics Act, 49 U. S. C. A. 488, could possibly result from the financing provisions of the proposed equipment acquisition program.

As to the first two matters, the recent case of *FCC v. RCA Communications*, 346 U. S. 86 (1953), is controlling. The Court there indicated that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desirable when there was sufficient traffic.[14] Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary. We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence.[15] See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951); *Colorado Wyoming Gas Co.* v. *FPC*, 324 U. S. 626 (1945).

We have examined Eastern's other contentions and have found them to be without merit.

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[14] "The Board in the past has recognized the benefits which accrue to the public from stiff multi-carrier competition in major traffic markets in the form of improved quality and quantity of service, increased coach service, utilization of the most modern equipment, etc. We believe that the authorization of a third Chicago-Miami carrier will bring comparable benefits here. We do not find that the services Delta and Eastern have provided are legally inadequate in terms of section 404(a) of the Act. However, we find that the Chicago-Miami market is sufficiently large now and has the inherent potential to support three carriers on an economic basis, and that the public interest will be served by certificating a third carrier." *Great Lakes-Southeast Service Case*, E-13024 [R. 15222].

[15] We note further that Eastern introduced no evidence on the issue of diversion, thus failing to sustain the burden required under *Clarke* v. *United States*, 101 F. Supp. 587, 594 (D. D. C., 1951).

CAPITOL.

As hereinbefore stated, Capitol was an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes. Capitol's objections to the Board's decision are two: first, the Board failed to make findings concerning Capitol's fitness and the public need for its proposed service; second, the Board erred in allowing additional time at oral argument for testimony by Members of Congress, several of whom testified in favor of Northwest, the carrier ultimately selected for the Miami-Chicago route. In connection with the second objection, Capitol has moved that this court appoint a Commissioner or Referee to determine whether Northwest procured the congressional testimony, the motion assuming that Northwest initiative in this respect would constitute exertion of undue influence upon the Board by the carrier.

Capitol contends that Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, requires that the Board, when it is confronted with a series of competitive applications, make findings as to whether each applicant is fit, willing and able to supply the service applied for, and as to whether the service proposed by each applicant is required by the public convenience and necessity. Capitol relies upon Section 401(d)(1) of the Act, 49 U. S. C. A. 481(d)(1) which reads as follows:[16]

> "(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is re-

[16] The parties agree that the applicability of the Civil Aeronautics Act to this case is unaffected by its repeal and replacement by the Federal Aviation Act of 1958, 49 U. S. C. A. 1301 *et seq.*

quired by the public convenience and necessity; otherwise such application shall be denied."

As we read this section it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided *not* to grant the certificate. Courts have previously held that where one of competitive applications is held preferable to the others from the standpoint of public interest, no further findings with respect to the unsuccessful applicants is required. *Continental Southern Lines* v. *CAB*, 197 F. 2d 397, 402-403 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 831; *North American Airlines* v. *CAB*, 241 F. 2d 445, 448 (D. C. Cir. 1957). The findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence.[17]

We find no merit in Capitol's contention that congressional testimony of record before the Board in favor of Northwest's application constituted undue influence. We so hold irrespective of whether Northwest actively solicited it. Equally without merit is Capitol's contention that the time consumed in the taking of this testimony denied Capitol equal time with other applicants for oral argument, or that the failure to announce in advance that time would be alloted for congressional testimony denied it an opportunity to prepare rebuttal and thereby denied it a fair hearing.

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[17] Capitol seems to suggest that *American Airlines* v. *CAB*, 235 F. 2d 845 (D. C. Cir. 1956), cert. denied, 355 U. S. 905, and *Pan American World Airways* v. *CAB*, 261 F. 2d 754 (D. C. Cir. 1958), cert. denied, 359 U. S. 913, have enunciated a more exacting standard for administrative findings of fact. These cases are not applicable here. They merely hold that where the Board permits air operations by exemption under § 416(b), 49 U. S. C. A. 496(b), rather than by the more rigorous procedure of certification under § 401, 49 U. S. C. A. 481, the Board must give reasons for this short-cut by findings more specific than a mere echoing of statutory language.

City of Nashville

The City of Nashville, Tennessee contends that the Board erred by excluding from consideration the needs of that city for improved air service. The Board's consolidation order[18] set as the westward limit of the geographic area under consideration a line from Chicago to Indianapolis to Louisville to Atlanta (and ultimately to Miami). Subsequently the westward limit was extended to include Chattanooga, Tennessee and Tallahassee, Florida. Nashville lies to the west of this westward limit as amended, and accordingly its service needs were not considered. We do not find that the geographic limits established by the Board were arbitrary or unreasonable, since we must always have in mind the need to keep the hearing within manageable proportions.[19] We find no error here.

Therefore, insofar as the Board's action is challenged by the petitions of Eastern, Capitol, and the City of Nashville, it is affirmed. Capitol's motion to refer certain matters to a Referee or Commissioner is denied.

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[18] Order No. E-9734, issued November 16, 1955.

[19] See note 3, *supra*.

APPENDIX B

The relevant provisions of the Civil Aeronautics Act of 1938, (52 Stat. 973), as amended (49 U. S. C. 401 *et seq.*), are:

TITLE IV—AIR CARRIER ECONOMIC REGULATION

"SEC. 2. (52 Stat. 980, 49 U. S. C. 402) In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics."

Certificate of Public Convenience and Necessity

Issuance of Certificate

"SEC. 401 (d) (1) The Authority (Board) shall issue a certificate authorizing the whole or any part of the

transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority (Board) hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

TITLE X—PROCEDURE

Orders, Notices, and Service

Form and Service of Orders

"Sec. 1005 (f) Every order of the Authority shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order."

The relevant provisions of the Administrative Procedure Act, (60 Stat. 242(b), 5 U. S. C. 1007 (b)) are:

"Sec. 1007 (b) Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record. Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusion, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. June 11, 1946, c. 324, sec. 8, 60 Stat. 242."

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No. 706

In the Supreme Court of the United States

OCTOBER TERM, 1959

CAPITOL AIRWAYS, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at 271 F. 2d 752. The opinion of the Civil Aeronautics Board (J.A. 1313a)[1] has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1959, and a petition for rehearing was denied on December 15, 1959. By order of January 14,

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[1] References to the Joint Appendix printed in the court below are designated "J.A. ——".

1960. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to March 14, 1960. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board, having determined in a comparative proceeding that one applicant has superior qualifications, must make further findings as to the individual qualifications of the losing applicant and the public need for its proposed type of service.

2. Whether the Board's established procedure for accepting oral or written statements by Congressmen or other public officials in certificate proceedings deprived petitioner of a fair hearing on its application.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, and the Administrative Procedure Act, § 8(b) 5 U.S.C. 1007(b), are set out in the appendix to the petition (pp. 15a-16a).

STATEMENT

Petitioner, a non-scheduled air carrier, was an unsuccessful applicant for Chicago-Miami and Detroit-Miami air routes in the Civil Aeronautics Board's *Great Lakes-Southeast Service Case*. After hearing and full administrative proceedings, the Board, by decision of September 30, 1958 (J.A. 1313a), concluded that only one additional carrier should be certified over each of these routes and, as between the competing applicants, awarded certificates to Northwest Airlines for the Chicago-Miami route and to Delta Airlines for

the Detroit-Miami route. The Court of Appeals for the Second Circuit affirmed (Pet. App. 1a-14a).

In his Initial Decision, the examiner made detailed findings with respect to the qualifications and proposals of the several applicants (J.A. 621a-768a), including the petitioner, Capitol Airways (J.A. 654a-665a, 668a). On the basis of these and other findings, he concluded that only one additional Chicago-Miami service was required (J.A. 879a-891a); that the need was for both coach and regular-fare service; that Capitol had proposed only coach service; that its experience as a scheduled operator was slight; that the type of equipment it proposed was unlikely to provide effective competition to Delta and Eastern, who already operated on the routes; and that Capitol had not secured firm commitments for financing any extensive Chicago-Florida operation (J.A. 908a-909a). Due account was taken of petitioner's proposal to provide coach service at fares lower than those already existing on the route, but the examiner concluded "upon a review of all of the factors relating to the comparative public interest that other applicants are in a superior situation to conduct the service" (J.A. 909a). Similar conclusions were reached with respect to the Detroit-Miami route (J.A. 919a).

The Board, adopting the relevant findings and conclusions of the examiner as its own (J.A. 1320a), concluded that Northwest's qualifications for the Chicago-Miami operation and Delta's for the Detroit-Miami route were superior to Capitol's. It noted the need for both first class and coach service on these routes, the economic strength and operating experience of the successful applicants, and their superior ability to place larger and newer types of aircraft into opera-

tion. The Board added, "We have even considered an experimental authorization of Capitol's service, in addition to the other new services we are authorizing, but we are unable to find that the advantages of such an experiment outweigh the competitive impact on the other new services we are authorizing" (J.A. 1331a).

At the oral argument before the Board, various Congressmen (or persons speaking on their behalf) were allowed to appear and present arguments as to the needs and interests of their localities in obtaining new air service.[2] Congressmen from areas to the northwest of Chicago supported Northwest's certification for the Chicago-Miami route on the ground that Northwest, by combining the new routes with those it already served, would be able to provide new service from the areas northwest of Chicago to southeastern points.

Petitioner appealed on the same grounds it raises here: (1) that the Board erred in failing to make specific findings as to petitioner's individual fitness or the public need for the particular service it proposed, and (2) that the Board erred in permitting the appearance of the Congressmen at oral argument. The Court of Appeals rejected both contentions (Pet. App. 12a-13a).[3]

---

[2] In addition, a number of written statements by Congressmen were received in lieu of oral argument.

[3] A separate petition for a writ of certiorari to review the judgment in the instant case has been filed by Eastern Air Lines, No. 785, this Term. The instant petition, however, presents no issues raised by Eastern; in fact Eastern's appeal was considered by the court below (see Pet. App. 4a-11a) separately from that of Capitol (Pet. App. 12a-13a).

ARGUMENT

1. Petitioner contends that the Board's failure to determine whether Capitol was "fit, willing, and able" to provide the service it had applied for, or whether the low-cost coach service it proposed would serve the public convenience and necessity, violated the requirements of §§ 401(d) and 1005(f) of the Civil Aeronautics Act, 49 U.S.C., 1952 ed., 481(d) and 645(f),[4] and § 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b). However, it misconceives the statutory requirements and the basis of the Board's action. As the Statement, *supra*, makes clear, the Board made detailed findings of fact as to the nature of the competing applicants and their particular service proposals and, after comparison of all the relevant factors, set forth the reasons why it had selected Northwest and Delta, in preference to Capitol, to provide the single new service required. See *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327; *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 351 (C.A.D.C.). The court below expressly found that "[t]he findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence" (Pet. App. 13a).

The Court of Appeals correctly ruled that the Board was not required to make additional findings with respect to the qualifications and proposals of the unsuccessful applicants, once it had properly determined, on a comparative basis, that their applications were to be denied. See *Continental Southern Lines* v. *Civil*

[4] The Civil Aeronautics Act of 1938, applicable to this case, has been repealed and replaced, without relevant change, by the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*

Aeronautics Board, 197 F. 2d 397, 402-403 (C.A.D.C.), certiorari denied, 344 U.S. 831; *North American Airlines* v. *Civil Aeronautics Board*, 241 F. 2d 445, 448 (C.A.D.C.). The cases upon which petitioner relies, *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, and *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board*, 231 F. 2d 517, 521-522 (C.A.D.C.), are not in point. Both dealt with the requirement that an agency make adequate findings on all relevant issues to support its rejection of an application (or other requested relief); they do not suggest that ultimate findings as to the individual qualifications and proposals of competing applicants are required, in addition to the comparative ones upon which the agency choice necessarily turns.

2. There is no merit to petitioner's contention that it was deprived of a fair hearing because various Congressmen supported Northwest. Section 401(*c*) of the Civil Aeronautics Act expressly states: "Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate." And, in accordance with this provision, Rule 14 of the Board's Rules of Practice, 14 C.F.R. 302.14, has long provided that "* * * a representative of any department, agency or branch of the Federal government or of any state government * * * may appear and present oral argument in any proceeding in which argument has been assigned." The policy is one of allowing full expression on the public record of conflicting points of view and full opportunity to air arguments. Quite obviously, this is the very antithesis of covert procedure; there is no analogy to the problems presented in such cases as

Sangamon Valley Television Corp. v. *United States*, 358 U.S. 49; *WIRL Television Corp.* v. *United States*, 358 U.S. 51; *WORZ, Inc.* v. *Federal Communications Commission*, 358 U.S. 55; *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F. 2d 55, 66-67 (C.A.D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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April, 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Delta Air Lines, Inc. ("Delta"), an Intervenor below on the side of Respondent, the Civil Aeronautics Board (the "Board" or the "CAB"), prays that insofar as Question One is concerned, this Court will deny the Petition for Writ of Certiorari filed in No. 786 by Capitol Airways, Inc. ("Capitol"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on October 7, 1959.[1]

[1] Citations to the Opinion below will be to Appendix A of the Petition in No. 786, *e.g.*, "(A7)". Citations to statutory sections on occasion will include references to Appendix B of said Petition. References to material in the printed Joint Appendix will be by page number thereof, *e.g.*, "(J.A. 123)".

INTRODUCTORY STATEMENT

The Petition presents two questions for possible review by this Court. Only Question One affects Delta, and this Reply Brief therefore will discuss only those matters presented by the Petition in support of that one question. Delta expresses no opinion as to whether this Court should review the matters presented by Question Two, except that if a Writ of Certiorari is issued concerning the latter matter, to request that review be limited strictly to that Question.

COUNTERSTATEMENT OF CASE

Delta agrees that the CAB order of which complaint is made denied Capitol's application for a certificate of public convenience and necessity to operate between Miami and Chicago and between Miami and Detroit, and instead granted applications of other air carriers to provide such service (Petition, p. 3). Delta also agrees with Capitol's representation of its status at the time the Agency proceeding was commenced (*ibid.*), with its description of the route authority which it sought (*ibid.*), and with its description of Congressional appearances at Oral Argument before the Agency (Petition, pp. 3-4). Finally, Delta has no objection to Capitol's summary of the decision of the Court below (Petition, pp. 4-5).

Delta does, however, disagree with two of Capitol's statements. Capitol says that it proposed to operate "... a low-cost air coach service over these routes at fares about 26 percent below those being charged by the existing carriers" (Petition, p. 3). It is true that Capitol proposed nothing but coach-type service, but it is not entirely accurate to state that its proposed fares would have been about "26 percent below" existing fares. The percentage spread of which Capitol talks, was between its suggested 4¢-per-passenger-mile fare

for the *one and only* type of service which it proposed, and the *average yield* experienced by existing carriers from the wide variety of different services which they in fact did operate to serve the public fully.

Actually, as was pointed out to the Agency, Delta, for example—which, together with Eastern, long has served the Chicago-Miami route to which Capitol aspires—had been providing day coach service at a yield (1957) of 4.716¢ and night coach service at a yield (1957) of 4.188¢ per-revenue-passenger-mile (R. 15,760). Capitol's proposed coach service thus would not drastically have differed from the coach services already being provided although, like Delta's existing coach service, it would have been provided at a lower fare than existing first-class service.

More important, Delta disagrees with Capitol's statement that in the Board's decision, "No findings were made concerning Petitioner's fitness or the public need for the low-cost service which it proposed" (Petition, p. 4). This is not correct.

The Examiner and the Board clearly found that the services proposed by Capitol were not required in the public interest. Capitol, as it admits here (Petition, p. 3), actually proposed nothing except a coach-type service. Accordingly, the Examiner specifically found:

> "*Capitol Airways' proposal contemplates a coach-only service,* although it was *indicated* that regular fare schedules would be inaugurated *in the event* the carrier found, *after* experimental operation of the route, that such service was required . . ." (J.A. 908-909; emphasis added).

The Board's decision, however, was that *both* first-class and coach services were needed (J.A. 909 and 1331).

The findings to support this conclusion were not contained only in the sections of the initial and Board decisions wherein it was concluded that Capitol's proposal would not sufficiently satisfy public needs, but were set forth throughout both of those decisions.

For example, the Examiner devoted considerable discussion to evidence showing high load factors (percentages of seats filled) on previously-existing nonstop services in both the Chicago-Miami and Detroit-Miami markets (J.A. 883-886 and 896-899). This evidence, and the Examiner's findings based thereon, related to all the nonstop service, both first-class and coach (J.A. 899, footnote 35). On this basis, the Examiner concluded with respect to the Detroit-Miami market, for example, that ". . . under such conditions the public was not receiving a fully adequate service and . . . many prospective passengers were in all probability unable to secure reservations" (J.A. 896). In other words, they were unable to secure reservations on *both* first-class and coach services.

Similarly, the evidence submitted by the civic parties (for example, Toledo, J.A. 473-476) and the findings made with respect thereto (J.A. 909), related to the need of all types of travelers, coach *and* first-class.

After studying the voluminous evidence, the Board reached its finding that *both* types of service were needed. As the Examiner (whose findings in this respect were adopted by the Board—J.A. 1320) put it, with specific reference to Capitol's proposal:

> ". . . The findings made earlier herein were not restricted to the need for coach service only but were applicable as well to the need for additional regular fare service. . . ." (J.A. 909).

And in its Decision, the Board said, again with specific reference to Capitol:

> "... Our findings of a need for additional service in these markets is based on both first class and coach service needs which Delta and Northwest can provide ..." (J.A. 1331)

In view of these findings, it was concluded that Capitol's coach-only proposal would not fully meet the requirements of the public convenience and necessity which were found to exist, whereas proposals of others would do so (J.A. 909, 961, 1332 and 1376).

The Board nevertheless also considered whether Capitol's limited type of proposal should be granted in addition to applications by other carriers which more fully were in accord with the public needs. But the Board specifically found that such a grant of Capitol's application adversely would affect other carriers in the market, contrary to the public interest. The Board said:

> "... We have even considered an experimental authorization of Capitol's service, in addition to the other new services we are authorizing, but we are unable to find that the advantages of such an experiment outweigh the competitive impact on the other new services we are authorizing. For example, we do not believe the Chicago-Miami traffic, the largest market under consideration, could now support a fourth, albeit special and experimental, service without substantial adverse impact on the other competing carriers. Accordingly, Capitol's application will be denied" (Order E-13024, J.A. 1331-1332).

ARGUMENT

The Petition Does Not Present Sufficient Reason for This Court to Review the Matters Raised by Question One.

Question No. 1, as stated by Capitol:

> Whether, in an adjudicatory proceeding involving comparative fitness, Section 401(d)(1) of the Civil Aeronautics Act requires the Civil Aeronautics Board to make findings when it denies (as distinguished from when it grants) an application for a certificate of public convenience and necessity.

Capitol presents two reasons why it thinks this Court should grant it a further hearing on the matters raised by Question One. The main point is an alleged conflict between decisions of the Courts of Appeal concerning the proper construction of Section 401(d)(1) of the Civil Aeronautics Act[1] (Petition, pp. 8-9). A second point is that in any event the construction given to that Section by the Court below is wrong (Petition, pp. 6-7).

I. There Is No Conflict Between the Decision Below and Other Decisions

There is clearly no conflict, however, between the decision below and other decisions construing Section 401. In order fully to appreciate this fact, it must be understood that Capitol's characterization of the decision below on this point is incorrect.

Capitol says that the ". . . Court below held that *no findings whatsoever* are necessary in these circum-

[1] 49 U.S.C. 481 (now Section 401 of the Federal Aviation Act, 49 U.S.C. 1371), set forth in Appendix B to Capitol's Petition, pp. 15a-16a.

stances" concerning the denial of an application (Petition, p. 5; emphasis in original). The Court did not say that. It said:

> ". . . As we read this section [Section 401] it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided *not* to grant the certificate. Courts have previously held that where one of competitive applications is held preferable to the others from the standpoint of public interest, no *further* findings with respect to the unsuccessful applicants is required . . . The *findings* leading the Board to select Northwest and Delta *in preference to* Capitol are sufficient and are supported by substantial evidence" (A13a; footnote omitted; emphasis added in part).

The "circumstances" to which Capitol alludes obviously were important to the Court's decision. Capitol here was only one of a number of applicants for Chicago-Miami and Detroit-Miami route authority. What the Court was saying, then, was that in such a situation, because the statute does not specify the type of ultimate finding required in the case of denials, the findings which establish that the grant of one application is required by the public convenience and necessity, can also constitute the findings which justify denial of a competing, but less satisfactory proposal in the same proceeding.

It is apparent from the foregoing Counterstatement of Case that the Board's decision here does contain explicit discussion, fully adequate to a Court's understanding of the Board's rationale, concerning the type of service needed. These findings established that a carrier was needed which would operate *both* first-class

and coach service. Because Capitol had proposed only coach service, these same findings also established that its proposal would not satisfy the public needs, and that its application therefore should be denied and another, more satisfactory proposal granted. This perhaps would have been enough; but the Board also explicitly indicated in its opinion that it was exactly *because* its findings had shown a need for a type of service (first-class service) which Capitol did not propose, that Capitol's application was being denied (J.A. 1331).

This was what the Court below approved. The Court did *not* say that no findings at all are needed, but rather that the reasons and basis for a decision to grant one application can, as here, also constitute the reasons and basis for denying another, competing proposal in the same case. The Court was not laying down a rule for universal application, e.g., in a case where there is only *one* applicant whose proposal the Board finds must be denied. The Court was ruling upon a situation where there *were* ample findings on the major issue of which of the various types of services proposed by a number of applicants were required by the public convenience and necessity.

Capitol says that this decision by the Court below is in conflict with the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board* (D.C. Cir. 1956), 231 F. 2d 517. Capitol points to two specific holdings in that case (Petition, pp. 8-9):

(1) "The agency's findings must also be sufficiently definite to enable the courts to perform the task of judicial review" (231 F. 2d at 521); and

(2) "Despite these considerations, the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and was relevant to the Board's ultimate decision as to what the public convenience and necessity required. The Board's failure to supply an answer was not harmless error, but prejudiced Greensboro's position in its efforts to obtain judicial review. We think the Board should now make appropriate findings of fact on the issue, and state 'the reasons or basis' for its conclusion" (231 F. 2d at 521-522).

There is clearly no inconsistency between the decision below and the first of the two above-quoted holdings of the District of Columbia Circuit. The Court below specifically recognized that the reasons for denial of Capitol's applications here lie in the reasons given by the Board for granting competing proposals, and that the latter reasons ". . . are sufficient and are supported by substantial evidence" (A13a). In other words, the Court below applied the very rule stated by the District of Columbia Circuit, and found that here the Board's findings *were* sufficiently definite to enable the Court to perform its task of judicial review.

Similarly, there is no inconsistency between the decision below and the second of the above holdings of the District of Columbia Circuit. In the first place, the *Greensboro Case* did not even purport to deal with the subject here involved, i.e., what type of findings, if any, are necessary to support a denial under Section 401 of an application for a certificate of public convenience and necessity. The *Greensboro Case* dealt only with the question whether the Board had ruled adequately upon the request of a civic intervenor that

a new certificate which was granted to a carrier applicant be worded in a certain way in order to prevent discrimination against the city.

More important, the reason for the District of Columbia Circuit's holding that Greensboro was to be given a "plain answer" to its charge of discrimination, was that neither the Examiner's initial decision nor the Board's decision in that case contained any explicit discussion of the point raised by Greensboro, so that the Board had failed to supply any answer at all (231 F. 2d at 521 and 522). The Board here clearly did supply a definite answer in denying Capitol's application for Chicago-Miami and Detroit-Miami route authority—i.e., that Capitol's application would not supply enough of the public services which had been found to be needed.

It is clear from the foregoing that there is no inconsistency between the decision below and that of the District of Columbia Circuit in the *Greensboro Case*. To the contrary, as the Court below pointed out, its decision accords with two holdings of the other Circuit, *Continental Southern Lines* v. *Civil Aeronautics Board* (D.C. Cir. 1952), 197 F. 2d 397, 402-403, *cert. den.* 344 U.S. 831, and *North American Airlines* v. *Civil Aeronautics Board* (D.C. Cir. 1957), 241 F. 2d 445, 448 A13a).

II. The Construction Given by the Court Below to Section 401(d)(1) of the Civil Aeronautics Act Is Not Erroneous

Capitol's whole argument concerning the alleged erroneous nature of the construction given by the Court below to Section 401(d)(1) (B15a-16a) turns upon Capitol's misunderstanding of the Court's holding. Capitol says that the question, which it alleges to

be of general interest (Petition, p. 16), is whether the phrase "otherwise such application shall be denied" in Section 401(d)(1) (B15a-16a), "requires that the Board make findings in cases where it *denies* an application" (Petition, p. 5). Leaping from that self-made springboard, Capitol conjures up a picture of dire consequences under the Civil Aeronautics Act and other statues containing similar language, if this Court should not review, and reverse, the alleged holding below that in denying an application the Board need make "no findings whatsoever" (Petition, p. 5).

But as seen above under Section I of this Argument, the Court below did *not* hold that the Board need make "no findings whatsoever." Moreover, the fact is that the Board *did* make findings (see Counterstatement of Case, *supra*) which the Court below held to be sufficient and to be supported by substantial evidence (A13a). Thus, the question is not the one put by Capitol. If any question is involved, it is whether the findings which the Board *did* make concerning the types of service needed by the public—findings which the Board specifically related to Capitol's proposals to provide only a *part* of those services (J.A. 1331), and which findings led the Board to grant competing, more satisfactory applications (*ibid.*)—were sufficient to support the Board's denial of Capitol's application.

Viewed in this light, the decision below clearly was proper. Capitol's only authority for contending otherwise is *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957), in which this Court reversed an Interstate Commerce Commission denial of an application for a motor carrier certificate. Insofar as the opinion reveals, Schaffer was the *only* applicant involved, not one of several applicants as Capitol was

here. The language in that case to which Capitol first points is the following:

> "Since the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said" (355 U.S. at 92-93).

To merely quote the language shows its inapplicability here. In the first place, as seen above, the Board here *did* evaluate the benefits that Capitol's proposed service would provide the public. The Board found that the benefits were insufficient to meet the needs, and thus was compelled to select another applicant whose proposal was more satisfactory. The Board even went further and considered the possibility of certificating Capitol in addition to the other carriers in the market, but concluded that this would be contrary to the public interest for reasons stated (J.A. 1331-1332).

In the second place, the *Schaffer* case apparently involved a single applicant, and thus the Commission's opinion could not do as the Board's opinion did here—i.e., make combined findings as to why the public interest required grant of one application rather than another. This Court in *Schaffer* was not dealing with the same problem which was presented to the Court below.

Furthermore, the problem in *Schaffer* was different for another reason. When this Court said, at 355 U.S.

92 that the Interstate Commerce Commission had ". . . failed to evaluate the benefits that Schaffer's proposed service would provide," it was talking about a specific duty imposed upon the Commission by the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1. The very cornerstone of the Court's opinion was the well-established duty of the Commission under that Policy to evaluate the "inherent advantages" of each of the several different modes of transportation under its regulation, so as to recognize and preserve each of them. In the *Schaffer* decision, the Court found that the Commission had failed completely to consider the "inherent advantages" of motor transportation such as Schaffer had proposed, including the ability of that type of transportation to provide lower rates than existing rail transportation, and thus had failed to discharge a specific statutory duty to make a certain type of comparative finding concerning different modes of transportation. *This* is what the Court meant when it said, ". . . the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates" (*ibid.*). The Court meant nothing more, and was not laying down a rule for application to agencies which are not bound by the National Transportation Policy, *supra*.

The CAB, of course, is not subject to that Policy, and has regulatory power over only a *single* mode of transportation—aviation. Despite Capitol's effort (Petition, pp. 6-7) to draw a parallel between the National Transportation Policy and Section 2 of the Civil Aeronautics Act, 49 U.S.C. 402 (B15a), the plain fact is that the Board has no duty to consider and evaluate

the "inherent advantages" of one mode of transportation *as compared to another*, but only to consider the advantages of air transportation itself and to improve relations only between air carriers themselves. Thus, the charge cannot be made here that the Board's decision "would give one mode of transportation unwarranted protection from competition from others" (355 U.S. 91), yet that was the very basis of this Court's decision in the *Schaffer* case.

For the above reasons it is clear that the decision below is not in any respect inconsistent with the *Schaffer* case. The decision of the Court below has not been shown to be erroneous in any other respect.

CONCLUSION

It is clear from the foregoing that there is not involved here a decision rendered by the Court below which is in conflict with the decision of another Court of Appeals on the same matter, nor a decision which has ruled upon a federal question in a way which conflicts with applicable decisions of this Court. In point of fact, because of Capitol's misunderstanding of the decision below, the problem which Capitol is attempting to raise under Question One does not even exist. The problem assumed may be an interesting one, but that fact alone does not justify burdening this Court with consideration of it:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . ." (*Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955))

Put differently, this Court does not sit to decide hypothetical or speculative questions. *Cf. United States* v. *Mayer*, 235 U.S. 55 (1914) and *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72 (1944).

Accordingly, Delta Air Lines, Inc. respectfully submits that a Writ of Certiorari should not issue with respect to Question One of the Petition for Certiorari in No. 786.

Respectfully submitted,

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OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY OF CAPITOL AIRWAYS, INC. TO BRIEF OF CIVIL AERONAUTICS BOARD IN OPPOSITION AND TO BRIEF OF NORTHWEST AIRLINES, INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY OF CAPITOL AIRWAYS, INC., TO BRIEF OF CIVIL AERONAUTICS BOARD IN OPPOSITION AND TO BRIEF OF NORTHWEST AIRLINES, INC., IN OPPOSITION

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Capitol Airways, Inc., respectfully submits this Reply to the Brief of the Civil Aeronautics Board and Brief of Northwest Airlines, Inc. in Opposi-

tion to the above designated petition. This reply is filed pursuant to Rule 24 of the Rules of the Supreme Court.

ARGUMENT

A. The Position of the Respondent Civil Aeronautics Board

1. The absence of findings both as to Petitioner's "fitness" and the "public need" for the service it proposed is not cured by finding substantial evidence to support the award to Petitioner's competitors. In order for comparative findings to satisfy the applicable statutory requirements, the competing proposals must, and they were not in this case, be substantially similar. Although the thrust of Petitioner's proposal was for a low cost coach service at fares about 26% below those proposed by Northwest and Delta, the Respondent made no evaluation of these proposed rate reductions. Instead, the Respondent found "we believe that the factors pointing to the selection of Northwest in the Chicago-Miami market and Delta in the Detroit-Miami market require their selection." (J.A. 1331a)

This situation is closely analogous to the one before this Court in *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957), where this statement was made:

> "... the Commission failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates ..."

2. Respondent's reply to Petitioner's second contention completely misses the point in suggesting that

the Congressional appearances may be sanctioned if they are open instead of covert. Without arguing which technique may be more effective, Petitioner contends that both destroy the agency's "judicial character" as prescribed by its own Procedural Regulations. It is the fact of Congressional interference, not its form, that violated the appearance of justice, and denied Respondent the fair hearing to which it was entitled.

B. The Position of Northwest Airlines, Inc.

Your Petitioner, Capitol Airways, Inc., has been served with a "Motion to be Named a Party Respondent and For Leave to File Brief in Opposition and Brief for Northwest Airlines, Inc. in Opposition", dated April 11, 1960. Certain statements contained in the brief submitted with the aforesaid motion require clarification and/or correction as follows:

1. Northwest makes the point (Brief, p. 29) that in a consolidated proceeding before the Civil Aeronautics Board, findings that one applicant is superior to others are sufficient, even though no findings are made with reference to unsuccessful applicants. As pointed out above, this argument presupposes that all applicants proposed substantially the same type of service. This was definitely not the case in the instant proceeding. Your Petitioner Capitol Airways, Inc. proposed to exploit a largely untapped air travel market of tremendous proportion by operating a low-cost air transportation service at fares of about 4¢ per passenger mile. In this connection the court's attention is respectfully invited to the dissenting opinion of Member Minnetti of the Civil Aeronautics Board in Order No. E-12203 in the *TWA Interim Fare Increases*

Case, Docket No. 9288, dated February 25, 1958, where the following statement is made:

> "Even more alarming than the possibility of alienating today's coach customers is the effect of this fare increase on the staggering percentage of adult Americans, approximately 75% who have never flown commercially. . . . The coach fare increase, granted by the majority, will further separate air transportation from many of these potential customers, to whom price is a major determinant in selecting a mode of travel."

In other words, the mere finding by the Respondent CAB that the type of service proposed by Northwest is needed (at fares of about 6¢ per passenger mile) does not constitute an adequate evaluation of your Petitioner's proposed low-cost service. Your Petitioner is legally entitled to findings on this subject by the Respondent CAB.

2. Northwest contends (Brief, p. 33) that the statements made by various members of Congress at oral argument "are not regarded or treated by the Board as evidence". This statement is ludicrous if Northwest means to imply either that the Board is not influenced by the appearance by members of Congress at oral argument, or that Northwest did not intend to influence the Board by soliciting such Congressional appearances—such solicitation was assumed by the Court below for purposes of its ruling. For example, its press release decision, dated May 19, 1958, in the so-called *"Seven States"* case, the Board made this statement:

> "While anticipating a considerable increase in the initial subsidy requirements of the airlines

> involved, the Board said that the spread of local service has the *clear approval of the public expressed through members of Congress* and state and civic leaders who have appeared before the Board in this and other cases." (Emphasis added)

Certainly, it would be difficult to find a clearer expression of the fact that appearances by members of Congress at oral argument in adjudicatory proceedings influence the decisions of the Board.

3. Northwest contends (Brief, p. 33) that the Congressmen appeared as "representatives of the Legislative Branch of the Government" under the provisions of 14 C.F.R. Section 302.14. Such is not the case. On the contrary, every member of Congress listed in Capitol Airways' Petition for a Writ of Certiorari, dated March 14, 1960, appeared as an *advocate* for Northwest Airlines and not a single one appeared pursuant to any Congressional resolutions or otherwise as a "representative of the Legislative Branch of the Government."

4. Northwest alleges (Brief, pp. 33-34) that "Capitol made no claim before the Board that the Congressional appearances were improper." This statement of Northwest is untrue. In its Petition for Rehearing, Reargument and Reconsideration, dated October 22, 1958, Capitol Airways, Inc., made the principal point that it was "denied a fair hearing" by virtue of the appearance by members of Congress at oral argument as advocates for Northwest. In its Petition for Rehearing, Capitol Airways quoted the same statements of the various Congressmen as were quoted in its petition to this honorable court. Moreover, in the court below, your Petitioner made the additional point

that the CAB had violated its own rules of practice in that it had permitted telegrams and other written statements to be transmitted by members of Congress or their representatives to the Board during oral argument.[1]

At page 34 of its Brief, Northwest seems to criticize Capitol Airways for filing its Petition for Rehearing before the Board "ten months after oral argument." The fact of the matter is that oral argument was held January 28, 1958, and the Board did not render its decision until October 2, 1958—approximately eight months later. Capitol Airway's Petition for Rehearing was filed October 22, 1958, in strict accordance with the rules of practice of the CAB.

C. Position of Delta Airlines, Inc.

Delta Airlines, Inc, gratuitously submitted a Brief in Opposition to the Petition for a Writ of Certiorari, even though Delta is neither a party to this case nor has it even moved to be named a party respondent. Accordingly, Delta's Brief should be returned for failure to conform to the Court's Rules.

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[1] See 14 C.F.R. Section 302.52(b); which provides that all "written data" presented at oral argument "shall be limited to facts in the record of the case being argued" and shall be served upon the opposing parties at least five days in advance of the argument.

CONCLUSION

For the reasons recited, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 15, 1960

PROOF OF SERVICE

I, Coates Lear, attorney for Capitol Airways, Inc., Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on April 15, 1960, I served a copy of the foregoing Reply upon the persons listed below, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, as follows:

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FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF DELTA AIR LINES, INC., TO BE NAMED AS A SPECIFIC PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION

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April 19, 1960.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION OF DELTA AIR LINES, INC., TO BE NAMED AS A SPECIFIC PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION

Delta Air Lines, Inc., (Delta) hereby respectfully moves that it be named as a specific party respondent in this case and for leave to file a brief in opposition to the petition for a writ of certiorari.

The interest and standing of Delta arises from the fact that it was a party to the proceeding below before the Civil Aeronautics Board (Board) and holds authority to engage in scheduled air transportation over certain routes for which the Petitioner Capitol Airways, Inc., unsuccessfully sought authority. Delta was also an intervenor on the side of the Board in the case below and participated fully both on brief and in oral

argument before the Court of Appeals for the Second Circuit wherein the Petitioner unsuccessfully sought to have set aside those portions of the Board's order[1] adverse to Petitioner and favorable to Delta.

Petitioner is requesting this Honorable Court to review and upon review to reverse the judgment of the Court below[2] upholding the validity of the Board's order which denied Petitioner operating rights, the grant of which would be adverse to Delta's interests. The issues of law and questions of fact raised by Petitioner directly involve Delta and accordingly, Delta has a substantial interest in the disposition of the petition for writ of certiorari.

Delta, as a party to the proceeding before the Board, and as an intervenor in the case below would have standing to petition for a writ of certiorari under 28 U.S.C., § 1254(1) and 49 U.S.C. § 646(f) [now 49 U.S.C. § 1486(f)] in the event the Court of Appeals below had held adverse to its interest. Delta submits that it should have equal standing to defend its interests as a party respondent in the instant case where the decision of the Court below favorable to the interests of Delta is being attacked by an adverse Petitioner. Accordingly, Delta is a real party in interest and should have been named as a specific respondent in Petitioner's application to this Court for a writ of certiorari.

On April 13, 1960, Delta filed a brief in opposition to petition for a writ of certiorari believing that it

[1] The opinion and order of the Civil Aeronautics Board appears at pp. 1313a-1400a of the printed joint appendix used in the Court of Appeals below.

[2] The opinion of the Court of Appeals is printed in appendix A of the Petition and is reported at 271 F. 2d 752.

was, by reason of its participation as a party in the case before the Court below, an automatic respondent herein, the Court's rules being silent on the subject and a copy of the said petition having been served on it. Delta's said brief was timely filed and received under Rule 24 of this Court. A question has been raised in a comment contained in a Reply by Petitioner dated April 15, 1960, as to Delta's standing when not specifically named as a respondent herein, therefore, this motion is filed in an abundance of caution.

WHEREFORE, Delta Air Lines, Inc., respectfully requests that to the extent it is not a party respondent to this case by implication that it be named specifically as a party respondent and that the brief timely filed by it on April 13, 1960 in opposition to the petition for a writ of certiorari be received with respect thereto.

Respectfully submitted

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FILE COPY

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REPLY OF CAPITOL AIRWAYS, INC. TO BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

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CAPITOL AIRWAYS, INC., *Petitioner,*

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY OF CAPITOL AIRWAYS, INC. TO BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Capitol Airways, Inc., respectfully submits this Reply to the Brief of Delta Air Lines, Inc., in Opposition to the Petition of Capitol Airways, Inc., for a Writ of Certiorari. This Reply is filed pursuant to Rule 24 and was not heretofore submitted to the

Court because at the time your Petitioner filed its original reply (April 15, 1960), Delta Air Lines, Inc. had not filed a motion to become a party to this proceeding. Delta's motion was dated April 19, 1960, and presumably will be granted by this honorable Court.

ARGUMENT

There is one point raised by Delta which requires correction and clarification. This is Delta's assertion (Brief, p. 3) that it has been providing day-coach service over the Chicago-Miami route at a yield of 4.716¢ per revenue passenger mile and night-coach service over this route at a yield of 4.188¢ per revenue passenger mile. Since your Petitioner, Capitol Airways, proposed a basic fare of 4.0¢ per revenue passenger mile, Delta argues that the proposal of your Petitioner was not substantially different from the existing service being offered by Delta and, therefore, it was sufficient for the Civil Aeronautics Board to make comparative findings regarding the various applicants as opposed to specific findings regarding your Petitioner's proposal.

The basic fallacy in Delta's argument is that Delta uses its *yield* per revenue passenger mile as a comparison with your Petitioner's *proposed fares* per revenue passenger mile. The yield which Delta (or your Petitioner) would receive is substantially less than the actual published fares for the reason that the yield takes into consideration round-trip discounts, family fare-plan reductions, agents' commissions and similar factors, all of which tend to reduce the fare on a per revenue mile basis.

The only equitable method of conforming fares is to use the same basis for comparison for both carriers.

The fact is that your Petitioner proposed a basic fare of 4.0¢ per revenue passenger mile over the long-haul routes to be served (*e.g.*, Chicago-Miami; Detroit-Miami) and a slightly higher fare over some of the short-haul routes. Taking the entire system into consideration, your Petitioner proposed a fare of 4.10¢ per revenue passenger mile.

At the hearing your Petitioner introduced an exhibit (Capitol Exhibit No. 38) listing all of the existing fares (first class, day-coach and night-coach), both in total dollars and in cents per mile, between all possible combinations of points proposed to be served by Petitioner. This exhibit showed that at the time of the hearing before the Civil Aeronautices Board, the existing carriers serving the Great Lakes-Florida area charged an average fare of 5.55¢ per revenue passenger mile. Your Petitioner's proposed fare of 4.10¢ per revenue passenger mile was therefore, 26.1 percent less than the existing fares. However, since the greatest savings would be realized by the first class passengers (which constitute the majority of travelers in the markets at issue), your Petitioner estimated that its average passenger would save 37.8 percent of the fare that would otherwise have been charged.

The type of service proposed by your Petitioner was novel and substantially different from the existing services offered by Delta and other large airlines serving the area involved. This difference was so pronounced that it was not a matter of degree, but a matter of the character of the service offered. Indeed, this fact is clearly recognized in the opinion of the Civil Aeronautics Board. Thus the Board states (J.A., 1331a), as follows:

"Capitol Airways has proposed a *novel* 4¢ per mile fare coach-service between Chicago and Miami and Detroit and Miami." (Emphasis supplied)

Under the circumstances, therefore, the Civil Aeronautics Board was required to make specific findings regarding the service proposed by your Petitioner. It was not sufficient for the Board to find merely that they preferred to grant the application of Northwest Airlines and Delta Air Lines in preference to the application of your Petitioner.

CONCLUSION

For the reasons recited the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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I, Coates Lear, attorney for Capitol Airways, Inc., Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on April 26, 1960, I served a copy of the foregoing Reply upon the persons listed below, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, as follows:

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